Supreme Court, U.S.
FILED
JUL 31 1980
MICHAEL RODAK, JR., CLERK

No. 79-1964

In The
Supreme Court of the United States

October Term, 1979

CECIL D. ANDRUS, SECRETARY
OF THE INTERIOR, PETITIONER

v.

MELTON E. BAKER

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Melton E. Baker, by and through his undersigned counsel, hereby responds to the Petition For Writ Of Certiorari filed by the Solicitor General on behalf of the Secretary of the Interior as set forth below:

Pursuant to Rule 40, Rules Supreme Court United States, Appellee elects not to set forth the material required by subsections A, B, and C of that Rule on the basis that same is set forth adequately in the Petitioner's Petition.

QUESTIONS PRESENTED

1. Can a mining claim be declared invalid because it contains too much of a valuable mineral?

2. If a mining claim can be held invalid because it, either alone or in conjunction with other claims owned by the same individual, contains too much of a valuable mineral, must the standards used by the Interior Department to make that determination be objective ones?

STATEMENT

In 1952 the Respondent-Appellee herein, MELTON E. BAKER, hereinafter referred to as "Baker" began mining a cinder deposit known as "Wild Cat Hill" near Flagstaff, Arizona. Subsequently, Baker attempted to secure fee title to 75 acres on Wild Cat Hill consisting of four mining claims known as the Wild Cat Hill, Nos. 1-4. Each of these claims contains 20 acres. After the application for patent to the claims was made in 1965, the application was challenged by the United States Forest Service and Baker's case was heard by an Administrative Law Judge. The hearing before the Administrative Law Judge occurred in 1969 and the decision of the Hearing Examiner is set forth and attached to the appendix of the government's brief (App. E, 46a-83a). The Administrative Law Judge validated all four of Baker's claims, except for five acres of one claim which had been previously withdrawn from mineral entry. The Interior Department, apparently not satisfied with the Administrative Law Judge's decision, appealed to the Interior Board Of Land Appeals, hereinafter referred to as "IBLA". After reviewing the record and decision of the Administrative Law Judge, IBLA reversed in part the Administrative Law Judge's decision and declared Wild Cat Hill Nos. 1 and 4 to be null and void. This decision is reported and set forth at 23 IBLA 319. The net effect of

IBLA's decision was to allow patent to issue in favor of Baker on 35 acres and to deny him patent and use of two (2) claims comprising forty (40) acres of his operating cinder mines.

On June 17, 1976, an action was filed by Baker in the United States District Court for the District Of Arizona, pursuant to the Administrative Procedure Act (5 U.S.C. Sec. 702) for a review of the IBLA decision referred to above. Cross Motions for Summary Judgments were then filed by Baker and the Interior Department, resulting in a dismissal by the District Court, in an unreported decision of Baker's appeal. Baker then appealed to the United States Court Of Appeals For the Ninth Circuit. The Ninth Circuit Court Of Appeals reversed the District Court's dismissal of Baker's appeal and remanded the case to the District Court with instructions to issue an Order to the Interior Department to issue patents on the two (2) previously invalidated claims. The Ninth Circuit decision is reported at 613 F. 2d 224 and it is from this decision that the government seeks review.

ARGUMENT

In order to adequately consider the Ninth Circuit Court of Appeals opinion from which the government now seeks review, it is necessary to consider the IBLA decision in Baker to which the Ninth Circuit addressed itself.

Baker has argued that the IBLA decision was arbitrary and capricious in that it introduced into the mining law a new and unknown test for the determination of what constitutes a valid discovery pursuant to time honored mining law. The IBLA decision sets up a "too much" test which, if it were to become the law, would allow the Interior Department to strike down valid mining claims by the use of their subjective opinion by subjectively determining that a claim contains too much mineral and is therefore invalid.

To appreciate the radical departure taken by IBLA, it is appropriate to review the major statutes and precedents in the field of mineral discovery.

The basic mining laws passed by Congress provide as follows:

> "A mining claim located after the 10th day of May, 1872, whether located by one or more persons may equal, but shall not exceed, 1,500 feet in length along the vein or lode; but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located." 30 U.S.C. Sec. 23.

30 U.S.C. Sec. 23 above is incorporated by reference into the Section on placer claims:

> "Claims usually called placers, including all forms of deposit, except in veins of quartz, or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims." 30 U.S.C. Sec. 35.

What is a "discovery" as referred to in 30 U.S.C. Sec. 23? Two primary tests must be satisfied before a discovery has occurred.

The first, known as the "prudent man rule" provides:

> "Under this 'prudent man' test in order to qualify as 'valuable mineral deposits', the discovered deposits must be of such a character that a 'person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine' . . .". *Castle v. Womble,* 19 Public Land Dec. 455 (1894)
>
> "This Court has approved the prudent man formulation and interpretation on numerous occasions." (Citations omitted). *United States v. Coleman,* 390 U.S. 599, 602 (1968).

The prudent man test stood for many years as the sole test for determining whether or not a valid discovery had occurred.

In 1968, the Federal Courts recognized a further test in addition to the "prudent man rule" for determining whether or not a valuable mineral discovery had occurred. This rule is known as the "marketability test" and requires the following:

> "To qualify as 'valuable mineral deposits' under the 'marketability test', it must be shown that minerals can be 'extracted, removed, and marketed at a profit.' " *United States v. Coleman,* 390 U.S. 599, 602; 88 Sup.Ct. 1327, 1329, 20 L.ED.2d 170 (1968); *Barrows v. Hickel,* 447 F. 2d 80, 82 (9th Cir. 1971).

Having defined what discovery is, it is necessary to determine when it occurred. It is universally held that a claim must be validated by verified existence of valuable minerals at the time of application for patent.

> "Before a mineral patent can be issued it must be shown as present fact, i.e., at the time of application for patent, that the claim is valuable for minerals. *U.S. v. Margherita Logomarcini,* 60 I.D. 371, 373; 1 American Law Of Mining, Section 4.27, page 647 (1960)." *Adams v. U.S.,* 318 F. 2d 861, 871 (9th Cir. 1963).

In addition to discovery at the time of the patent application requirement stated above, claims including so-called "common varieties" (sand, gravel, cinders, etc.) must be shown to have been supported by a valid "discovery" prior to the effective date (July 23, 1955) of the Common Varieties Act, 30 U.S.C. Sec. 611. This Act of Congress provides:

> "A deposit of common varieties of sand, stone, gravel, pumice, or cinder shall not be deemed a valuable mineral deposit within the meaning of the Mining Laws of the United States so as to give effective validity to any mining claim *hereafter* located under such mining laws . . .". (Emphasis added).

Since the Common Varieties Act applies only to mining claims located "hereafter", it does not invalidate claims supported by a valid "discovery" prior to the effective date of the Act.

Since the Ninth Circuit Decision for which review is sought merely strikes down an Interior Board of Land Appeals decision, that IBLA decision warrants close attention.

In order to have prevailed as he did before the Administrative Law Judge, Baker had to show that his claim was valid prior to 1955, and that a valuable mineral discovery still existed on his claims at the time he applied for patent. In order to show that he had made a valuable mineral discovery, it was necessary for Baker to meet the "prudent man test" and the "marketability test" prior to 1955, and to show that the "prudent man test" and the "marketability test" were still met at the time of his application for patent. Apparently, IBLA (23 IBLA 332) recognized and followed the authorities set forth above:

> "The Act of July 23, 1955 removed common varieties of cinder from location under the mining laws. Thus, it is incumbent upon one who located a claim prior to that date for a common variety of cinder to show that all of the requirements for discovery, including a showing that the materials *could* have been extracted, removed, and marketed at a profit, has been met by that date. *Multiple Use, Inc. v. Morton,* 504 F.2d 448 (9th Cir. 1974); *Barrows v. Hickel,* 447 F.2d 80 (9th Cir. 1971); *Palmer v. Dredge Corp.,* 398 F.2d 791 (9th Cir. 1968)." (Emphasis supplied).

In the quotation of the IBLA decision cited above, IBLA sets forth all known and judicially recognized tests which have been used to determine whether or not a common variety mineral location is valid under the mining laws. The Interior Board of Land Appeals later in its decision agrees with all of the findings made by the Administrative Law Judge (who validated all of the claims) and states the following (23 IBLA 332):

"On the basis of these tests, we have little difficulty in agreeing with Judge Mesch that Baker discovered a valuable deposit of common varieties cinder prior to July 23, 1955, for which there was an existent demand, that there was adequate access to the deposit, the deposit was within reasonable proximity to the market, and that he then initiated a bona fide effort to develop a mine."

Since IBLA admitted it agreed with Judge Mesch's findings, let us consider what some of these critical findings were (Administrative Law Judge's Decision, page 17):

"A mining engineer and retired mineral examiner, formerly with the Bureau Of Land Management (T.R. 899, 905) testified in behalf of the contestee that:

... there can be no question in anyones mind as to the existence of the mineral, which is in this case cinders. That whole hill is cinders. So there can be no question of the discovery of cinders by anyone on these claims. The value is quite evident. These cinders have been sold, and at their very minimal value, which is 10¢ per yard, this constitutes a—there has been more than 1,000,000 yards of cinders removed and sold from these claims. Now, that is $100,000 which is not hay. I think there is no question in anyones mind that any man would be prudent in attempting to hold or develop these claims ... (T.R. 932)."

The Administrative Law Judge, at page 17 of his decision, also summarized testimony which he obviously found very persuasive:

"Mr. Baker testified (1) that prior to July 23, 1955, cinders were extracted, removed, and marketed from each of the four (4) claims (T.R. 813, 895); (2) that the claims *have been continuously worked since at least 1953,* and they are presently being worked (T.R. 787, 788, 835); (3) that he probably sold around 4,000 yards in 1954, and 6,000 or 7,000 yards in 1955 (T.R. 812, 813, 871); (4) that he estimates that he has produced over a million yards of cinders from the four (4) claims since 1953 (T.R. 788, 814); (5) that he has not person-

ally hauled and marketed cinders for a long time, but operates the pits on a royalty type basis where he gets 10¢ a yard for cinders in place, and in addition the purchaser who provides his own equipment, pays him construction skill wages to assist in extracting and removing the cinders (T.R. 803, 815); (6) that the cinders have been used for, among other purposes, insulation in cinder blocks (T.R. 812), in the surfacing of asphalt roads (T.R. 817), to provide a porous fill that will not retain water or moisture behind concrete abutments (T.R. 817, 930), for packing around road culverts (T.R. 817), for cinder blocks (T.R. 818), in leaching fields or drains for septic tanks (T.R. 808), and for driveways, yards and mudholes (T.R. 808, 812); and (7) that in 1959, they started construction of a house on the property and they have resided there since 1960 (T.R. 850, 891)." (Emphasis supplied).

The Forest Service had argued at the trial of this matter that top soil had been removed from above the cinders and, therefore, this fact made them not locatable under the mining laws. In dispatching with this argument, the Administrative Law Judge stated the following at page 18 of his decision:

> "The amount of top soil, if any, that was removed and sold would be so minimal in comparison with the amount of cinders extracted and marketed that it is not worthy of consideration."

The IBLA decision discusses the Administrative Law Judge's reasoning as set forth above on pages 332 through 335 thereof. After this discussion at 23 IBLA 335, the Interior Board of Land Appeals stated the following:

> "Accordingly, we find that although Baker was justified in the reasonable and prudent anticipation that a valuable mine could be developed on this deposit, and in proceeding with the expenditure of his labor and means to that end, *he located claims for far more land and mineral than reason and prudence would allow.*" (Emphasis supplied).

IBLA goes on to explain that on the two (2) validated claims most of the buildings and roads are located, and that these would obviously make the best mining operations. A rather large assumption, since we are talking about open pit mining. IBLA then goes on to contrast the other two invalidated claims at 23 IBLA 335 as follows:

> "By contrast the workings on the Wild Cat Hill Nos. 1 and 4 claims, *although numerous*, are comparatively small and scattered and, aside from the access roads, are otherwise unimproved." (Emphasis supplied).

Apparently, IBLA recognizes that claim Nos. 1 and 4 have pits on them which would certainly indicate mining operations and sales, but since they lack buildings this in some way makes them less desirable than claims 2 and 3 upon which the permanent improvements are located.

This decision seems even more incredible when we consider the original prudent man rule in *Castle, supra*, and *Coleman, supra*, which states:

> "... in order to qualify as 'valuable mineral deposits', the discovered deposits must be of such a character that a 'person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine ...' ". *Coleman, supra*, at 602.

Baker must take issue with two (2) statements made in the government's brief on pages 14 and 19 which state respectively as follows:

> "By its decision, the Ninth Circuit has once again attempted to thwart the Secretary's exercise of his authority and, indeed, his responsibility *"to indentify with greater precision and objectivity* the factors relevant to a determination that a mineral deposit is valuable. *United States v. Coleman* ...". (Emphasis supplied).

> "Again, like the prudent person market ability test, the excess reserves analysis, while objective, *is admittedly somewhat imprecise.*" (Emphasis supplied).

First of all, by reading the Ninth Circuit decision which the government wishes this Court to review, it is clear that the Ninth Circuit is not attempting to thwart anyone in exercising their authority. The Ninth Circuit decision merely recognizes that the "too much" test promulgated by the Interior Department is totally subjective and creates a "heads I win, tails you lose" situation for the Interior Department when judging the validity of mining claims.

When the marketability test set forth in *Coleman, supra,* was decided by this Court, it overruled a previous decision of the Ninth Circuit Court of Appeals which had rejected the marketability test. However, it is important to note that in *Coleman, supra,* this court addressed itself to a new test (the marketability test) which was *objective* in its nature and, therefore, approved it. This Court specifically stated that the marketability test allowed the Secretary to:

> "... *identify with greater precision and objectivity* the factors relevant to a determination that a mineral deposit is valuable ...". *Coleman, supra* at 602 (Emphasis supplied).

Consider the "precision and objectivity" of the "too much" test which is now before this Court. In order for a mining claimant to validate his discovery of valuable minerals, he must be prudent in the expenditure of his time and effort with hope that he has the reasonable prospect of developing a paying mine. If he does this, he has a "discovery" as contemplated in *Castle, supra,* and *Coleman, supra.* However, at the same time when he locates this claim, he must use his prudence and reason to make sure that he does not locate more land and mineral than his same prudence would allow.

Logically extended the miner, when confronted with two claims that he can potentially locate and attempt to patent, one of which is superlative with respect to the amount of mineral available and the other being mediocre would be forced by the IBLA decision to choose the mediocre claim and to pass up the superlative one. Under the "too much test" his "prudence and reason" should tell him he should not locate too much mineral, for if he does, he will run afoul of this latest IBLA test.

This new test, arbitrarily grafted onto the established law of discovery, is in direct conflict with the purpose of the mining law.

Further, it applies to all claims, not just those containing "common varieties". The critical questions involved in this appeal are (1) can the Interior Department lawfully establish an "upper limit" to the value of a claim or group of claims; (2) if so, must the Interior Board of Land Appeals use an objective standard in determining the *amount* of "excess" which will cause a claim to be held invalid?

Firstly, it seems incredible that IBLA could decide that Baker had located a valuable mineral property and then say, he has located too much of it and, therefore, the "too much" must be invalidated.

Secondly, apparently IBLA based its decision upon the content of the whole four claims viewed together. This is in direct contradiction of the established requirement that each claim must be viewed on its own merits. The IBLA decision seems to say that each claim must be viewed on its merits, but after it has been viewed as such, the aggregate of the claims must then be considered together and if, in IBLA's opinion, too much mineral has been located, they reserve the right to arbitrarily determine how much of too much is to be taken away.

Thirdly, the "too much test" promulgated by IBLA purports to limit the amount of mineral and land an individual may claim pursuant to the mining laws. As the size of claims are set by law, this "test" effectively limits the num-

ber of claims an individual may stake. Nothing in the mining law authorizes such a limitation and Congress has never indicated such an intention.

Fourthly, this new test as proposed by the Interior Board of Land Appeals requires that the time honored prudent man of mining potentially forego a tremendously valuable find in favor of a mediocre one, since a tremendously valuable find might be subject to invalidation under this "test", whereas a mediocre find would probably afford a better chance for an uncontested patent. If "prudence" still means anything in the prudent man rule, then such a result is ludicrous.

A "valuable mineral deposit" is one that a person of ordinary prudence would be justified in expending his labor and means with a reasonable prospect of developing a valuable mine. This is the basic rule set forth since the 1800's in *Castle, supra*. Thus, the "valuable", as used in mining law, contemplates an indefinite period of preliminary expenditures toward physical development of the mine and marketing outlets, followed by a profitable period of production and sales sufficient to cover the previous expenditures and, hopefully, to provide some financial reward to the individual making the investment. Obviously the longer the "income" period is in relationship to the "outgo", the more "valuable" the mine will be. If quality of the mineral throughout the deposit remains the same or even improves, and an ongoing demand exists for the mineral in question, the "value" of the deposit will increase in direct proportion to the volume of the deposit. Hence, the concept of "too much" in the IBLA decision is totally inconsistent with the requirement that a deposit be "valuable".

Further, it should be noted that a government patent to land confers fee simple title, not a life estate or a term of years. While all mines will, by their nature, exhaust themselves eventually, the mining laws developed through the years places no man made length of time during which the

prospector may enjoy the fruits of his labor and investment. The law offers an estate in perpetuity, together with all future profits, in exchange for discovery and initial development of commercial deposits of needed national resources. The new test proposed by the Interior Department would modify this time honored agreement so as to insure that only some unspecified moderate return could be expected from prospecting. Any such fundamental change in the mining law must come from Congress, not as a result of administrative fiat.

It is clear that whether a patent application is filed on behalf of 1 or 500 claims, it is necessary that each individual claim stand upon its own merits and be declared valid or invalid based upon whether or not a discovery has been made within the individual claim.

> "A mineral discovery upon a claim is the *sine qua non* for its validity; and although location of boundaries and monuments upon the ground may precede discovery or discovery may precede such location so long as intervening rights are not affected, it is essential to validate it that a mineral discovery be made within the limit of the claim located, *discovery of mineral upon one claim or group of claims, even though contiguous, does not validate the others. Ranchers Exploration and Development Company v. Anaconda Company,* 248 F. Supp. 708, 714 (Cent. Div. Utah 1965). (Emphasis supplied).

The IBLA decision struck down by the Ninth Circuit decision required the miner not only prove individually that each of his claims are supported by a "discovery" as required by *Ranchers, supra,* but then goes on to say that after the claims have met the *Ranchers, supra,* test, they will then be viewed in totality by IBLA and, in the event IBLA determines there is too much mineral, IBLA may cut down the amount to whatever it feels is reasonable without any apparent objective safeguards in making that decision. That is a decision which is arbitrary and capricious and allows the Interior Department to say to any miner that his

claim or claims have too little and, therefore, do not satisfy the discovery rules or in the event they have too much they run afoul of the new proposed test. This is a classic example of heads I win, tails you lose.

What if the Wild Cat Claim Nos. 1-4 had been located by two different miners. Assume Mr. Baker had located Claims 1 and 4 and Mr. Smith had located Claims 2 and 3. Since the hearing examiner had decided that the claims were valid and passed the discovery and marketability rules, how would IBLA's decision of "too much" square against two (2) separate mining claimants? Would the decision have invalidated one of Mr. Baker's claims and one of Mr. Smith's claims? Consider again IBLA's reasoning at page 335 of the decision:

> "Accordingly, we find that although Baker was justified in reasonable and prudent anticipation that a valuable mine could be developed on this deposit, and in proceeding with the expenditure of his labor and means to that end, *he located far more land mineral than reason and prudence will allow.*" (Emphasis supplied).

The Ninth Circuit Court Of Appeals in striking down the "too much test" proposed by IBLA, recognized the total subjectivity of the test and struck it down for that reason. The Ninth Circuit also recognized the inconsistent position the government has taken with respect to Baker's claim in a footnote on page 8a in the government's appendix to its Petition, which states as follows:

> "'In its most ingenuous argument, the government says that a claimant (such as Baker) should not be able to curtail competition by removing a mineral source from the public lands which the government would otherwise be able to sell itself under 30 U.S.C. Sec. 601. In fact, the government has offered Baker the opportunity, for a price, of continuing his mining operations on the disputed first and fourth claims. And so the government maintains two rather contradictory positions in regard to the two disputed mining claims.

> In its management of the disputed claims pending this appeal, the government apparently believes that, in view of the foreseeable needs of the market and Baker's need for the mineral, Baker may want to mine the disputed claims for a reasonable fee. However, for purposes of this lawsuit, the government argues that Baker had located an excess supply of cinders in view of his needs and the foreseeable needs of the market."

In other words, the Ninth Circuit has recognized that if the "too much test" were approved with all of its subjectivity, the government can invalidate part of a claim on the basis that it contains too much valuable mineral, and then turn around and offer to lease back to the mining claimant the same invalidated ground, and cause the mining claimant to now pay the government for whatever minerals he might remove. In fact, that was done in this case, and the price was proposed to be 16¢ per yard.

CONCLUSION

The IBLA "too much test" represents a major departure from traditional mining law concepts. It deals with "foreseeable markets", "potential use rates", and other factors which are purely speculative and totally subjective. It would allow the Interior Department to require a mining claimant to meet all the traditional tests to prove a valuable discovery on each individual claim, and then allow the government to view the claims in totality and make a decision to take some of the claims away from the miner, based upon their highly subjective opinion of how much is too much. This type of fundamental change in the mining laws of our country should occur only through legislative action and not through the twisting of proven judicial concepts. Fortunately, the Ninth Circuit Court Of Appeals recognized the fundamental deficiencies in the proposed IBLA "too much test" and struck it down in their well-reasoned and authoritative decision.

Therefore, it is respectfully urged that this Court deny the issuance of its Writ Of Certiorari for review of the Ninth Circuit Court Of Appeals decision.

Respectfully submitted this 31st day of July, 1980.

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